FILED
(1) 06-330 SEP 5 - 2006
No. OFFICE OF THE CLERK

In the Supreme Court of the United States

FATIMA WELIVER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

HENRY EIGLES
Attorney At Law
10729 Evening Wind Court
Columbia, MD
(410) 730-1195

ALAN UNTEREINER*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioner

QUESTIONS PRESENTED

The Civil Service Reform Act of 1978, 5 U.S.C. § 7701(a), provides that "[a]n employee * * * may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation" and specifically confers on an "appellant * * * the right – (1) to a hearing * * *." The questions presented in this case are:

1. Does a government employee who withdraws her MSPB appeal challenging the termination of her job on the eve of the hearing engage in a "voluntary" and "knowing" waiver of her statutory right (*Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938)) if she acts out of a reasonable belief that – because of multiple, unwarranted restrictions placed by the Administrative Judge on her right to discovery and to confront and cross-examine the crucial witness against her – the hearing will be a sham and going forward with it will violate her due process rights and cause her to suffer severe reputational harm without any possible hope of relief?

2. Is the "knowing and voluntary" nature of a waiver of rights under 5 U.S.C. § 7701(a) conclusively established merely by an employee's expression, in a motion or other communication, of a desire to withdraw her appeal – without any need for further inquiry on the Administrative Judge's part into the surrounding circumstances – where the employee also communicates a request to discuss the proposed withdrawal with the judge?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual Background 2

B. The Proceedings Before The Administrative Judge 7

C. The Review Proceedings Before The MSPB ... 11

D. The Proceedings In The Federal Circuit 12

REASONS FOR GRANTING THE PETITION 13

I. The Withdrawal Of An Administrative Appeal Is Not "Voluntary" And "Knowing" Where A Claimant Reasonably Believes That Going Forward With A Hearing Will Violate Her Due Process Rights And Inflict Severe Reputational Harm 15

II. This Case Is An Excellent Vehicle For Clarifying The Standards Governing The Determination Of The Voluntariness Of Waivers Of Statutorily Conferred Rights To Administrative Remedies 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. *Gardner-Denver Co.*,
415 U.S. 36 (1974) ..... *passim*

Bass v. *United States Postal Service*,
96 M.S.P.R. 683 (2004) 17

Boykin v. *Alabama*, 395 U.S. 238 (1969) 21

Brady v. *United States*, 397 U.S. 742 (1970) 17, 23

Carmichael v. *United States*, 298 F.3d 1367
(Fed. Cir. 2002) 20

Ferby v. *United States Postal Service*,
26 M.S.P.R. 451 (1985) 2, 14

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 17, 23

Gibson v. *Berryhill*, 411 U.S. 564 (1973) 20

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 16

Greene v. *McElroy*, 360 U.S. 474 (1950) 16

Jackson v. *Department of the Air Force*,
45 M.S.P.R. 483 (1990) 11

Johnson v. *Zerbst*, 304 U.S. 458 (1938) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 15

McCall v. *U.S. Postal Service*, 839 F.2d 664
(Fed. Cir. 1988) 17, 23

McCarthy v. *Madigan*, 503 U.S. 140 (1992) 20

Murphy v. *United States*, 69 Fed. Cl. 593 (2006) 20

Ohio Bell Tel. Co. v. *Public Util. Comm'n*,
301 U.S. 292 (1937) 17, 23

Oubre v. *Entergy Operations, Inc.*,
522 U.S. 422 (1998) 22

Ricketts v. *Adamson*, 483 U.S. 1 (1987) 21

Soto v. *Department of Justice*,
95 M.S.P.R. 552 (2004) 17

Spruill v. *Merit Systems Protection Board*,
978 F.2d 679 (Fed. Cir. 1992) 13

Town of Newton v. *Rumery*, 480 U.S. 386 (1987) 21-22

United States v. *Mezzanatto*,
513 U.S. 196 (1995) 21

United States Postal Service v. *Gregory*,
534 U.S. 1 (2001) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Willner v. *Committee on Character & Fitness*, 373 U.S. 96 (1963) 10, 16

Constitution, Statutes, Rule and Regulations:

U.S. CONST. AMEND. V 1

Age Discrimination and Employment Act, 29 U.S.C. § 621 *et seq.* 22

Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) 22

Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 17, 21

5 U.S.C. § 7512(1) 15

5 U.S.C. § 7513(d) 15

5 U.S.C. § 7701(a) ..... *passim*

5 U.S.C. § 7703(a) 15

5 U.S.C. § 7703(a)(2) 13

5 U.S.C. § 7703(b)(1) 14

5 U.S.C. § 7703(c) 15

42 U.S.C. § 1983 22

FED. R. CRIM. P. 11(b)(2) 25

TABLE OF AUTHORITIES—Continued

Page(s)

5 C.F.R. §§ 1201.1 to 12.205 15

5 C.F.R. § 1201.22(b)(1) 7

5 C.F.R. § 1201.24(d) 16

5 C.F.R. § 1201.25 7

5 C.F.R. §§ 1201.71-85 15

5 C.F.R. § 1201.73 16

5 C.F.R. § 1201.73(d)(1) 7

5 C.F.R. § 1201.73(d)(2) 8

5 C.F.R. § 1201.73(d)(3) 8

5 C.F.R. §§ 1201.81-85 16

5 C.F.R. § 1201.113 12

5 C.F.R. § 1201.115 12

5 C.F.R. § 1201.115(d) 12

Miscellaneous:

Craig Senn, *Knowing And Voluntary Waivers Of Federal Employment Claims: Replacing The Totality Of The Circumstances Test With A "Waiver Certainty" Test*, 58 FLA. L. REV. 305 (2006) 22

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The orders of the court of appeals affirming the decision of the Merit Systems Protection Board (App., *infra*, 1a-2a), and denying rehearing (*id.* at 10a-11a), are both unreported. The Merit Systems Protection Board's opinion denying the petition for review (*id.* at 3a-5a), and the Administrative Judge's opinion dismissing petitioner's administrative appeal from the termination of her employment with the Social Security Administration (*id.* at 6a-9a), are also unreported.

JURISDICTION

The court of appeals entered judgment on April 10, 2006, and denied rehearing on June 7. App., *infra*, 1a-2a, 10a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution provides, in pertinent part, that "[n]o Person shall be * * * deprived of life, liberty, or property, without due process of law * * *." 5 U.S.C. § 7701(a) provides in pertinent part that "[a]n employee * * * may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation" and "shall have the right – (1) to a hearing * * *."

STATEMENT

This case raises important and recurring questions about the legal standards and procedural safeguards that apply to a determination by the Merit Systems Protection Board ("MSPB") that the withdrawal of an administrative appeal by a discharged employee was "voluntary" or uncoerced because it was based on a "knowing" and intelligent waiver of the employee's statutory right to a hearing. *Johnson* v. *Zerbst*, 304 U.S. 458,

464 (1938); see also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). The MSPB has expressly "adopted the Supreme Court's definition of waiver as set forth in *Johnson v. Zerbst*[.]" *Ferby* v. *United States Postal Service*, 26 M.S.P.R. 451, 455 (1985).

Petitioner Fatima Weliver withdrew her administrative appeal of the decision to terminate her job on the eve of the scheduled hearing after being subjected to a pattern of rulings by the Administrative Judge ("AJ") that deprived her of a fair opportunity to engage in discovery and develop her case. This included the AJ's inexplicable failure (despite express promises to the contrary) to issue a subpoena that would have allowed Weliver to secure the attendance at the hearing of the government's crucial witness against her. Without the ability to confront and cross-examine that key witness (a basic requirement of due process), the outcome of the public hearing was a forgone conclusion and would only inflict serious reputational injury on Weliver. Under these circumstances, petitioner had no real choice but to withdraw her appeal – and the determination by the AJ (and the full MSPB on appeal) that her withdrawal was "voluntary" under these circumstances, reached based solely on her expression of a desire to withdraw the appeal and without any inquiry into the surrounding circumstances (despite an unanswered request by her lawyer to discuss the withdrawal with the AJ), was manifestly erroneous. To clarify the legal standards and procedural safeguards governing waivers in this important setting, further review by this Court is warranted.

A. Factual Background

1. This case arises out of the termination of petitioner Fatima Weliver's employment with the Social Security Administration ("SSA"). Up until June 4, 2004, Weliver held the position of Claims Examiner with the Glen Burnie, Maryland District Office of the SSA. Weliver, a native Brazilian who is a naturalized U.S. citizen, was employed as a bilingual Claims Examiner. At the time she was fired, Weliver

had been employed by the SSA for over four years and had received acceptable performance ratings. See Fed. Cir. Joint Appendix ("C.A. JA"), at 39.

During her tenure with the SSA, petitioner had a number of disagreements with agency management, centering on her treatment by Linda Faulkner-Martin, the Manager of the Glen Burnie, Maryland District Office, and Donna Jones, the Assistant District Manager. After Weliver's union (Local 1923, American Federation of Government Employees) filed a grievance on her behalf alleging that she had been subjected to harassment and abuse, the SSA on August 9, 2002 entered into a settlement agreement providing for Weliver's placement outside of the Glen Burnie office. C.A. JA 24. On April 16, 2003, however, Ms. Faulkner-Martin cancelled Weliver's union placement and compelled her to return to the Glen Burnie office. *Ibid.* Petitioner contends that this action violated the settlement agreement and that, upon her return to the Glen Burnie office, she was subjected to further harassment and abuse by both Faulkner-Martin and Jones. *Ibid.*

2. On March 24, 2004, Assistant Manager Jones notified Weliver of her proposed removal from her job, citing two grounds: (1) failure to follow a management directive; and (2) conduct unbecoming of a federal employee. C.A. JA 53. In the memorandum explaining this proposed action, Jones noted that Weliver recently had participated in a training class put on by the agency and faulted Weliver for telephoning several other employees who were also students in the program at their homes after working hours. *Id.* at 53-54. According to Jones, these calls "violated a management directive" forbidding Weliver to call "your classmates at home" after working hours. *Id.* at 53. This directive, Jones explained, was issued after management received complaints by Weliver's classmates about critical comments she had made "about management officials." *Ibid.*[1]

---

[1] The management directive stated that Weliver had previously been admonished not to use her cell phone during the training classes, but acknowledged that Weliver had "adhered to th[is] directive." C.A. JA

Jones's memorandum also faulted Weliver for "conduct unbecoming a federal employee" – allegedly behaving in a manner that was "disrespectful and discourteous" as well as "disruptive." C.A. JA 54. Weliver's supposedly unacceptable behavior, virtually all of which was in her direct interactions with Jones, included objecting to participating in a meeting about her workplace behavior with Jones without being allowed to have her lawyer present. *Id.* at 55. Jones terminated the meeting after initially permitting Weliver to call her lawyer and thereafter making Weliver end the telephone call "because [Weliver] started discussing issues that were not relevant to our conversation." *Ibid.* This and other behavior on Weliver's part, Jones's memorandum claimed, "violated the letter, spirit, and intent of government wide and agency standards of conduct." *Id.* at 55-56; see also *id.* at 56 ("Without question, such behavior is noncompliant and aberrant – overstepping recognized workplace norm [sic].").

On April 2, 2004, Jones sent Weliver a revised letter setting forth the reasons for the proposed termination of her job. C.A. JA 45-52. In addition to reiterating the earlier charges and allegations verbatim, the revised letter included new allegations to support Jones's claim that Weliver had engaged in "conduct unbecoming a federal employee." Specifically, Jones's letter stated that Rebecca Gartelman, an office maintenance worker employed not by SSA but by an outside contractor, had complained on March 29, 2004 to District Manager Linda Faulkner-Martin that Weliver had been "tormenting" her. *Id.* at 47. Among other things, Gartelman told agency management that Weliver had come up behind her while Gartelman was cleaning a commode and assaulted her by forcing her head down into the toilet, causing the ends of Gartelman's hair to get wet from the toilet water, and all the while screaming at

---

19. Among other things, the directive also instructed Weliver not to "prepare material for your union representative" during the classes, *ibid.*; there is no allegation that Weliver violated this aspect of the directive.

Gartelman: "You know that you are a dirty rat, don't you?" *Id.* at 48. Jones's revised letter also cited as a further example of "conduct unbecoming a federal employee" Weliver's refusal, at a meeting on March 31, 2004, to discuss her workplace behavior with Jones (after Jones, once again, refused to allow Weliver to have her lawyer present for the meeting). *Ibid.*

3. After receiving the April 2 proposal, Weliver, through counsel, on April 29, 2004 submitted a written response to Ms. Jones's letter. See C.A. JA 35. Among other things, Weliver vigorously disputed the veracity of Rebecca Gartelman's story and noted that, because Weliver was undergoing certain treatments for cancer, she simply lacked the physical strength to push another person's head into a toilet. *Id.* at 36.[2] Weliver also contended that the charge that she disobeyed a management directive not to phone her co-workers after working hours was "bogus" and any such directive was clearly beyond the agency's authority. *Id.* at 37. In addition, Weliver claimed that agency management had violated the 2002 settlement agreement as well as her right to have her attorney present at meetings relating to her job performance. *Id.* at 35-37.

On May 26, 2004, Weliver's counsel sent a letter to the Commissioner of the Social Security Administration explaining

---

[2] Weliver's counsel submitted a sworn affidavit indicating that, on April 1, three days after the alleged assault in the lavatory and one day before Jones's April 2 revised proposal, he had conducted a telephone interview with Gartelman. C.A. JA 227-230. During that interview, Gartelman "was quite calm and expressed no fear or recriminations pertaining to any purported events involving her with Ms. Weliver," and she told counsel that "most of the employees in the Office make fun of Ms. Weliver," Ms. Weliver "is harassed but no one tries to help her," and management has instructed a security guard to "keep an eye on" Ms. Weliver and follow her around. *Id.* at 227-28. Although Gartelman had agreed to speak with Weliver's counsel again on April 5, an agency lawyer left counsel a voicemail stating that any attempt to follow up on Gartelman's offer by communicating with her again "would be considered harassment of Ms. Gartelman by Ms. Weliver." *Id.* at 229.

that his client had "been [the] subject of orchestrated harassment and abuse by the management of the Glen Burnie District Office, and now that [same] management" was seeking "to remove [her] from the Federal Government" based on unfounded allegations and "false testimony." C.A. JA 43. Counsel requested that the Commissioner review, investigate, and resolve this matter instead of the Regional Office that has oversight responsibility for the Glen Burnie District Office. *Id.* at 43-44. Along with this letter, counsel enclosed Jones's April 2 proposal and Weliver's responses to the allegations made therein. *Id.* at 43.

4. Six days after Weliver requested intervention by the Commissioner's office, Ms. Faulkner-Martin adopted Assistant District Manager Jones's proposal and fired Weliver, effective June 4, 2004. C.A. JA 34-42. In her June 1, 2004 letter explaining this decision, Faulkner-Martin rejected as unsubstantiated Weliver's argument that Gartelman was not telling the truth about the incident in the restroom. See *id.* at 36 (stating as well that Weliver's claims about her medical condition were unsupported by "medical evidence"); cf. note 3, *infra*. Faulkner-Martin also rejected Weliver's arguments concerning the directive not to call co-workers at home. C.A. JA 37. After "adopt[ing] and incorporat[ing] herein all of the reasons for removal articulated by Ms. Jones in her April 2, 2004 Proposal to Remove," Faulkner-Martin concluded that petitioner was a "divisive force in this office" and should be fired. *Id.* at 37-39.

5. On June 3, 2004, Weliver's counsel sent another letter to the SSA Commissioner again requesting that the Commissioner resolve this matter and taking issue with numerous statements made in Faulkner-Martin's June 1, 2004 termination letter. C.A. JA 28-33.[3] Among other things,

---

[3] Attached to the June 3 letter from Weliver's counsel was a copy of an April 7, 2004 letter from petitioner's physician (previously submitted to agency counsel on April 12, 2004) attesting that Weliver had undergone surgery and radiation for breast cancer, that she

Weliver's counsel again reported that he had spoken with Rebecca Gartelman on April 1, three days after the alleged incident involving the lavatory and one day before Donna Jones issued her amended letter proposing petitioner's termination, and explained that Gartelman's "demeanor" during that interview – along with a friendly note she had given to Ms. Weliver a week or so before – flatly refuted any suggestion that Weliver was threatening and harassing Gartelman, as agency management had claimed in firing Weliver. *Id.* at 29.

B. The Proceedings Before The Administrative Judge

1. On June 24, 2004, petitioner filed an administrative appeal of the agency's termination decision with the Northeastern Regional Office of the Merit Systems Protection Board. C.A. JA 23-27. On June 29, the Administrative Judge issued an order acknowledging receipt of Weliver's petition for administrative review, describing in general terms the availability and timing of discovery under the MSPB's procedures, and directing the SSA (as required by MSPB regulations, see 5 C.F.R. §§ 1201.22(b)(1), 1201.25) to submit a response and produce the case file within 20 days. C.A. JA 60, 62-64. On the SSA's motion, which petitioner did not contest, the time for producing the case file was extended by 7 days until July 26, 2004. *Id.* at 87, 120.

Under MSPB regulations, discovery must begin within 25 days of the date of the order acknowledging the petition for review. See 5 C.F.R. § 1201.73(d)(1); C.A. JA 62. In this case, that deadline was July 24, which was before the case file and SSA response were due under the extended deadline. Petitioner complied with this regulation by serving her First Set of Interrogatories and First Request for Production of Documents on the SSA on July 8. C.A. JA 77-86. The SSA provided responses to Weliver's initial discovery requests on July 30. *Id.*

---

continues to "experience[] pain in her breast," and that she "remains at high risk." C.A. JA 29, 31.

at 120. Weliver had received the case file and response from SSA on July 27. *Ibid.*

The SSA's response and case file included several written statements by Rebecca Gartelman that had not previously been disclosed to petitioner. See C.A. JA 133. These statements underscored the critical importance of Gartelman's testimony and the need not only to depose her in advance of the hearing on petitioner's administrative appeal but also to have her available at the hearing for cross-examination. Without such access to Gartelman, petitioner reasonably feared that it would be impossible to challenge Gartelman's false account of the assault in the restroom and therefore impossible to prevail in her challenge to SSA's decision to fire her.

Under MSPB regulations, supplemental requests for discovery "must be served within 7 days of the date of service of the prior response, unless the parties are otherwise directed." 5 C.F.R. § 1201.73(d)(2). Accordingly, on August 3 (within 7 days of receiving the case file including Gartelman's statements), Weliver's counsel moved for a subpoena to take the deposition of Gartelman, who was a nonparty witness because (as noted above) she was employed by an outside contractor and not by the SSA. Under MSPB regulations, "[a]ny motion to depose a nonparty (along with a request for a subpoena) must be submitted to the judge" within 25 days of the date of the order acknowledging the petition for review "or as the judge otherwise directs." 5 C.F.R. § 1201.73(d)(3). In moving for leave to depose Gartelman, Weliver pointed out that she "had nothing to respond to until both the Case File and Agency's response to [her] Discovery materials were received," that her motion was timely under MSPB rules governing supplemental requests for discovery, and that obtaining Gartelman's deposition testimony was absolutely necessary "to disprove the scandalous charges made against" her. C.A. JA 120-21. The SSA opposed Weliver's motion to depose Gartelman, and the Administrative Judge denied the motion. *Id.* at 130 (AJ stated that motion "is untimely and good cause has not been shown").

The judge subsequently denied Weliver's motion for reconsideration of this ruling. *Id.* at 140.[4]

With the September 1, 2004 date of the hearing fast approaching, the AJ on August 16 *sua sponte* rescheduled the pretrial conference from the morning of Wednesday, August 25 to afternoon of Friday, August 27. C.A. JA 139, 251. At the August 27 pretrial conference, Weliver's counsel underscored the crucial importance of Gartelman's presence at the upcoming hearing:

> Ms. Gartelman's testimony is essential. They have asserted that Ms. Weliver has performed unconscionable acts with her and you will have her affidavit and statements[.] [That Gartelman] would not be subject to cross-examination is untenable.

Id. at 144. Evidently agreeing with counsel's submission, the AJ approved Ms. Gartelman as a witness at the hearing to be held five days later and made an unequivocal commitment to issue a trial subpoena for Gartelman and fax it to Weliver's counsel on the following Monday, August 30. *Id.* at 149 (AJ: "I will do it first thing Monday morning * * * ."); see also *id.* at 154. In response to the concerns voiced by Weliver's counsel that this might not leave enough time to effect service on this crucial witness for a hearing only two later, the AJ stated:

---

[4] Notably, the AJ also denied other motions filed by Weliver to obtain needed discovery. These included Weliver's motion to compel responses to her First Set of Interrogatories and First Request for Production of Documents; her motion to compel depositions of certain agency personnel; and her motion to compel additional document production. C.A. JA 129, 140-41. The only explanation provided by the AJ for each of these rulings was that petitioner had failed to show "good cause." In light of these setbacks in her ability to develop her case, Weliver also filed a motion requesting that her hearing be rescheduled from September 1 to September 8 (a date that was available to the AJ and to all parties, see *id.* at 147). The AJ summarily denied this request as well, explaining again only that Weliver had not shown "good cause." *Id.* at 128.

"[Y]ou are going to be pressed for time, I understand all of that." *Id.* at 149-50. The AJ also directed Weliver's counsel that, "[i]f you have a problem, * * * you will have to call me and let me know * * * ." *Id.* at 154. The AJ would not, however, make any commitment that the hearing would last longer than one day. See *id.* at 153, 155.

Contrary to her assurances, the Administrative Judge did *not* issue the subpoena for Ms. Gartelman on Monday, August 30. On the morning of August 31, in keeping with the AJ's directions, Weliver's counsel called the AJ's office but was informed by her staff that the AJ was absent from her office on August 30 and 31 and thus the subpoena could not be issued until September 1, the date of the hearing. C.A. JA 189-90.

2. Faced with the prospect of a public hearing at which there would be no opportunity to cross-examine the agency's key witness, whose testimony was devastating to his client, Weliver's counsel, again consistent with the AJ's prior directions, called the AJ's chambers and left the following message:

> Hello, Judge Squire, *I would like to speak with you.* I discussed this case at length with Ms. Weliver and we reached the decision to dismiss the appeal *and I would like to discuss it with you.* I'm at (410) 730-1195. Thank you. Bye.

C.A. JA 162 (emphasis added). When counsel did not hear back from the AJ as requested, he filed a motion to dismiss Weliver's appeal with prejudice toward the close of business on August 31. *Id.* at 157-59. Counsel took this action to avoid being compelled to participate in a hearing whose outcome (in light of Gartelman's unavailability) was a forgone conclusion and whose procedure would violate Weliver's fundamental right to cross-examine the witness "whose word [could] deprive[] [her] of h[er] livelihood." *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 103 (1963).

3. On September 1, 2004, the Administrative Judge, without calling Weliver's counsel as requested, dismissed the administrative appeal. App., *infra*, 6a-9a. The Administrative Judge explained:

> After the prehearing conference on August 27, 2004, but before the scheduled hearing on September 1, 2004, I received [a] telephone call from the appellant's representative which notified me that after consulting with the appellant, the appellant advised him that she desired to withdraw her [sic]. * * * .
>
> I subsequently received a Motion to Withdraw the appeal from the appellant's representative which indicated that the appellant desired to withdraw her appeal with prejudice. I find that the *representative's motion constitutes an effective voluntary desire to withdraw the appeal.* Therefore, the motion is GRANTED and the appeal is withdrawn. This matter is dismissed from further consideration. *See Jackson v. Department of the Air Force*, 45 M.S.P.R. 483, 484 (1990) (withdrawal of an appeal is an act of finality that removes it from the Board's jurisdiction)

App., *infra*, 7a (emphasis added).

C. The Review Proceedings Before The MSPB

1. Weliver filed a petition for review of the Administrative Judge's decision dismissing her administrative appeal. In support of that petition, Weliver submitted an affidavit of her counsel describing his phone call with the AJ's staff on the morning of August 31 (in which counsel was informed that the subpoena for Gartelman could not be issued before the hearing). C.A. JA 189-90. Among other things, Weliver contended that the AJ's various discovery and scheduling rulings and failure to issue deposition and trial subpoenas for Gartelman deprived Weliver of due process of law and rendered the scheduled hearing an empty exercise. C.A. JA 171-88. She also contended that, because of these circumstances and the AJ's pattern of rulings preventing her from presenting her case, she had no real

choice but to withdraw her administrative appeal and that withdrawal accordingly was not "voluntary" and "knowing," contrary to the AJ's conclusion.

On March 2, 2005, Weliver made a supplemental submission to the MSPB in which she inquired about the status of her appeal and provided additional materials from the record of a related proceeding for unemployment benefits before the Maryland State Department of Labor, Licensing and Regulation. C.A. JA 195-226. The supplemental record materials showed that Gartelman was a convicted felon with a long criminal record and that she had given perjurious testimony during the Maryland proceeding. Weliver faulted the SSA for "embrac[ing] Ms. Gartelman's testimony of assaults by Ms. Weliver without investigation of her and her background * * * ." *Id.* at 195.

2. The MSPB denied Weliver's petition for review. App., *infra*, 3a-5a. In doing so, the Board observed that it "grant[s] petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation." *Id.* at 3a (citing 5 C.F.R. § 1201.115). The MSPB explained:

> After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review.

Id. at 3a-4a. The Board's action rendered "[t]he initial decision of the administrative judge * * * final" and adopted the AJ's ruling as "the Board's final decision in this matter." *Id.* at 4a (citing 5 C.F.R. § 1201.113).

D. The Proceedings In The Federal Circuit

Weliver filed a timely petition for review of the MSPB's decision in the United States Court of Appeals for the Federal

Circuit.[5] She renewed her contention that the Administrative Judge's denial of discovery, scheduling decisions, and failure to issue deposition and trial subpoenas for the crucial witness against her (Gartelman) violated her fundamental rights to due process of law and effectively rendered her decision to withdraw her administrative appeal involuntary. Pet. C.A. Br. 1-2, 13-16, 18-29.

In an unpublished order, the court of appeals affirmed the decision of the MSPB. App., *infra*, 1a-2a. The Federal Circuit offered no explanation for its rejection of petitioner's arguments. Weliver's petition for rehearing was also denied, again without explanation. *Id.* at 10a-11a.

REASONS FOR GRANTING THE PETITION

This case raises two important and recurring questions concerning the waiver of rights conferred by the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(a), on certain federal employees. After petitioner was fired from a job she had held for more than four years with the Social Security Administration, she challenged her firing by initiating an administrative proceeding before the Merit Systems Protection Board. Over the course of that proceeding, however, the Administrative Judge issued a series of rulings that severely curtailed petitioner's ability to pursue her challenge, culminating in the AJ's inexplicable failure to issue a subpoena for the crucial government witness (even though the AJ had recognized the vital importance of this witness and had promised to issue the subpoena).

Faced with the prospect of a hearing where there would be no opportunity to confront and cross-examine this key witness,

---

[5] Because the decision to dismiss her appeal turned on the MSPB's "procedure or jurisdiction" rather than on the underlying personnel decision, petitioner named the MSPB rather than the SSA as the respondent in the court of appeals. See *Spruill* v. *Merit Systems Protection Board*, 978 F.2d 679, 684 (Fed. Cir. 1992); 5 U.S.C. § 7703(a)(2).

and where the hearing itself would violate her right to due process and inflict serious reputational harm on her without any possibility of relief (because the agency's termination of her job would be upheld based on the witness's perjurious written statements), petitioner had no real choice but to withdraw her administrative appeal. Despite the request of petitioner's counsel to discuss the withdrawal, the AJ ruled, without calling back or conducting any inquiry in the surrounding circumstances, that the sudden withdrawal of petitioner's administrative appeal on the eve of the hearing was voluntary; the MSPB upheld that ruling on appeal over petitioner's contention that she acted under duress and did not voluntarily relinquish her right to a hearing; and the Federal Circuit, without opinion, affirmed.

Review is warranted because the decision below is manifestly incorrect and the MSPB's disposition of petitioner's administrative appeal was based on a legally flawed waiver analysis that departs substantially from this Court's teachings in other settings where the "knowing and voluntary" standard for evaluating waivers has been applied.[6] See *Ferby* v. *United States Postal Service*, 26 M.S.P.R. 451, 455 (1985) (expressly "adopt[ing] the Supreme Court's definition of waiver as set forth in *Johnson v. Zerbst*[]"). Beyond that, this case is an excellent vehicle for clarifying the legal principles and procedures that should govern the determination of whether waivers of statutorily conferred rights to a hearing before an administrative agency (and to other administrative remedies) are indeed "knowing" as well as "voluntary." For that reason as well, the petition should be granted.

---

[6] Because the Federal Circuit has exclusive jurisdiction over MSPB appeals, see 5 U.S.C. § 7703(b)(1), other circuits have not had any occasion to develop conflicting approaches to the waiver of administrative hearing rights under 5 U.S.C. § 7701(a).

I. The Withdrawal Of An Administrative Appeal Is Not "Voluntary" And "Knowing" Where A Claimant Reasonably Believes That Going Forward With A Hearing Will Violate Her Due Process Rights And Inflict Severe Reputational Harm

A. It is well settled that government employees have a protectible property interest in the jobs that provide their livelihood and in the administrative remedies that are available to protect them from the wrongful or improper termination of employment. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (describing public employee's interests "in retaining his employment" and in "disproving his employer's charges of incompetence or inability" under established remedial scheme as "substantial"). The Civil Service Reform Act of 1978, 5 U.S.C. §§ 7701(a), 7512(1), 7513(d), confers on eligible federal employees (such as petitioner) the right to appeal termination and other serious disciplinary actions to the Merit Systems Protection Board. *United States Postal Service* v. *Gregory*, 534 U.S. 1, 3 (2001). MSPB regulations, in turn, create a detailed procedural scheme for the determination of such claims before Administrative Judges in the first instance with a right of appeal to the MSPB. See 5 C.F.R. §§ 1201.1 to 1201.205. The MSPB's regulations also include detailed provisions for discovery in these administrative proceedings. 5 C.F.R. §§ 1201.71-85.[7]

This procedural scheme safeguards the Fifth Amendment rights of federal employees to receive due process of law. Of course, "[t]he fundamental requisite of due process of law is the opportunity to be heard * * * at a meaningful time and in a

---

[7] Under 5 U.S.C. § 7703(a), an employee who is adversely affected or aggrieved by a final decision of the MSPB may take an appeal to the Federal Circuit, which in turn is authorized to review the agency's decision by "determining whether [it is] unsupported by substantial evidence or * * * 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Gregory*, 534 U.S. at 6 (quoting 5 U.S.C. § 7703(c)).

meaningful manner." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (internal quotations omitted). Toward that end, the right to a hearing is secured both by statute and by regulation. 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.24(d). To satisfy the requirements of due process, a hearing ordinarily must allow for "an effective opportunity to defend by confronting any adverse witnesses and by presenting [the employee's] own arguments and evidence orally." *Goldberg*, 397 U.S. at 268; see also *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 103 (1963) ("We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.") (citing *Greene* v. *McElroy*, 360 U.S. 474, 492, 496-97 (1950)).

In *Greene*, this Court emphasized the vital importance of the rights of cross-examination and confrontation of adverse witnesses as "basic ingredients in a fair trial." 360 U.S. at 496 n.25. "[W]here government action seriously injures an individual, and the reasonableness of the action depends on fact findings," the Court explained, "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Id.* at 496. Moreover, "[w]hile this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Ibid.* Not only "in criminal cases * * * but also in all types of cases where administrative and regulatory actions were under scrutiny," the Court added, "[w]e have formalized these protections in the requirements of confrontation and cross-examination" and "ha[ve] been zealous to protect these rights from erosion." *Id.* at 496-97. Consistent with these fundamental requirements of due process, the MSPB's regulations authorize the issuance of subpoenas to require the attendance of witnesses at depositions and at the administrative hearing on a discharged employee's appeal. See 5 C.F.R. §§ 1201.73, 1201.81-.85.

When an employee with the right to avail herself of the MSPB's procedures by pursuing an administrative appeal elects to withdraw her appeal, she thereby waives her statutory right to a hearing and an array of other protections. It is well established that courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Exactly the opposite is true: "in the civil no less than the criminal area, courts indulge every reasonable presumption *against* waiver." *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). Moreover, it is well established that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). This Court has held that the "voluntary and knowing" standard applies to an employee's waiver of rights under Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974).

The MSPB treats the withdrawal of an administrative appeal as "an act of finality that removes the appeal from the Board's jurisdiction." *Bass* v. *United States Postal Service*, 96 M.S.P.R. 683, 685 (2004). In an effort to adhere to the principles just described, the MSPB has recognized that the withdrawal of an administrative appeal – and the attendant relinquishment of all the rights, protections, and remedies associated with it – must be "voluntary" as well as "clear, decisive, and unequivocal." *Soto* v. *Department of Justice*, 95 M.S.P.R. 552, 555 (2004). Thus, the MSPB has expressly adopted the "knowing and voluntary" standard for waivers that this Court has recognized in many other settings. See pages 2, 14, *supra*; *McCall* v. *U.S. Postal Service*, 839 F.2d 664, 666-67 (Fed. Cir. 1988). At the same time, however, the MSPB has indicated that it "[g]enerally * * * will not reinstate a withdrawn appeal absent unusual circumstances such as misinformation or new and material evidence." *Soto*, 95 M.S.P.R. at 555.

B. In this case, the record before the administrative agency amply established that petitioner withdrew her appeal on the eve of the hearing because she reasonably believed that, in light of the Administrative Judge's failure to issue a subpoena as promised, and the pattern of prior rulings unreasonably denying petitioner needed discovery, it would be an exercise in futility to go forward with the hearing. Beyond that, petitioner reasonably believed that if the hearing were conducted without the attendance of Rebecca Gartelman, the government's crucial witness, petitioner would be deprived of her fundamental right to confront and cross-examine Ms. Gartelman concerning the false account of the assault in the lavatory and would suffer substantial reputational injury as a result of the public hearing on her appeal. Under these circumstances, it is difficult to see how the agency could possibly have concluded that petitioner's withdrawal of her appeal was free from duress or coercion.

The AJ, however, ruled that Weliver's motion to withdraw "constitute[d] an effective voluntary desire to withdraw the appeal" (App., *infra*, 7a), relying solely on the fact that the motion itself (and counsel's previous voicemail) indicated that Weliver wished to abandon the proceeding. But that simplistic analysis overlooks the fact that Weliver's counsel had also specifically asked the AJ to call him to discuss the matter:

> Hello, Judge Squire, *I would like to speak with you.* I discussed this case at length with Ms. Weliver and we reached the decision to dismiss the appeal *and I would like to discuss it with you.* I'm at (410) 730-1195. Thank you. Bye.

C.A. JA 162 (emphasis added). The AJ's ruling also failed to take into account Weliver's counsel's expressed concern over the crucial importance of securing Gartelman's attendance at the hearing, the AJ's broken promise to issue the trial subpoena, the AJ's inexplicable absence from her office and unavailability on the two days preceding the scheduled hearing, and counsel's concerned call to chambers about the missing subpoena. Viewed against the backdrop of other adverse rulings made by

the AJ – denial of a subpoena to depose Gartelman; rescheduling of the pretrial conference from Wednesday, August 25 to Friday, August 27; denial of the request to continue the hearing date until September 8 even though that date was available to everyone; and denial of many other reasonable discovery requests, all with no explanation – the motion to withdraw alone hardly established the voluntariness of Weliver's waiver of her rights.

Moreover, although it is perhaps understandable that the Administrative Judge would discount or underestimate the coercive effect of her prior discovery rulings and her failure to issue the trial subpoena for Gartelman as promised, the same cannot be said of the MSPB in its appellate capacity. Petitioner raised all of these arguments with the agency in appealing the AJ's order dismissing her case. C.A. JA 171-90. She also highlighted the basic unfairness of the AJ having granted the agency an extension of time to file its case file (which for the first time disclosed two written statements made by Gartelman), but then denying her supplemental requests for discovery (in response to that revelation) as untimely. In support of her appeal of the AJ's dismissal order, petitioner not only submitted an affidavit of her counsel but also (in support of a supplemental filing) provided additional materials from the record of a related proceeding for unemployment benefits before the Maryland State Department of Labor, Licensing and Regulation. C.A. JA 195-226. These supplemental record materials demonstrated that Gartelman was a convicted felon with a long criminal record and that she had given perjurious testimony during the Maryland proceeding. Weliver faulted the SSA for "embrac[ing] Ms. Gartelman's testimony of assaults by Ms. Weliver without investigation of her and her background * * * ." *Id.* at 195.

In denying the petition for review, the MSPB reasoned that there was no "significant new evidence * * * presented to us" that was previously unavailable and, more importantly, that "the administrative judge made no error in law or regulation that

affects the outcome." App., *infra*, 3a-4a (citing 5 C.F.R. § 1201.115). But that conclusion was clearly mistaken on both counts. Significantly for present purposes, the AJ's ruling *did* rest on an error of law – an unduly restrictive definition of voluntariness and the standards governing waivers of constitutional and other valuable rights. Contrary to the AJ's apparent belief, such rights are not "voluntarily" waived or relinquished by a claimant who reasonably believes that she has no other choice, because to proceed with a hearing will inflict severe reputational harm upon her and deny her fundamental rights to confront and cross-examine hostile witnesses whose testimony is the basis for losing her job.

The coercive nature of this situation is confirmed by other lines of authority establishing that a party should not be required to continue to suffer an untenable situation in order to preserve a subsequent challenge and may be excused from proceeding with administrative processes that are futile. For example, in the analogous area of the law concerning constructive termination of employment, courts have recognized that an employee who resigns "may rebut the presumption of voluntariness by presenting evidence to demonstrate that the resignation was offered under duress, caused by the government's coercive acts * * *." *Murphy* v. *United States*, 69 Fed. Cl. 593, 604 (2006); see also *Carmichael* v. *United States*, 298 F.3d 1367, 1372 (Fed. Cir. 2002) (otherwise voluntary discharge may be rendered involuntary if obtained as a result of wrongful government conduct causing duress or coercion, including government's failure to follow its own regulations).

Similarly, this Court has recognized a "futility" exception to the ordinary requirement that administrative remedies be exhausted. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. 140, 146-47, 148 (1992) (exhaustion not required where "administrative remedy may occasion undue prejudice to subsequent assertion of a court action" and "where the administrative body is shown to be biased or has otherwise predetermined the issue before it"); *Gibson* v. *Berryhill*, 411 U.S. 564, 575 n.14 (1973) (same).

In both of these analogous areas of law, the courts have sensibly recognized that circumstances such as those faced by petitioner may lead an individual to cut short the administrative process or take steps that might (mistakenly) appear to be voluntary when the individual has no real choice to do otherwise.

II. This Case Is An Excellent Vehicle For Clarifying The Standards Governing The Determination Of The Voluntariness Of Waivers Of Statutorily Conferred Rights To Administrative Remedies

Because this Court has recognized a general presumption that constitutional and statutory rights are waivable, it has had occasion to address the validity of waivers in a wide variety of settings. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-02 (1995). Many of these cases have involved criminal law and procedure because a "criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *Id.* at 801. Examples include *Ricketts* v. *Adamson*, 483 U.S. 1, 10 (1987), which recognized that a double jeopardy defense is waivable by pretrial agreement; *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969), which held that a knowing and voluntary guilty plea waives the privilege against compulsory self-incrimination, right to jury trial, and the right to confront one's accusers; and, of course, *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938), which held that the Sixth Amendment right to counsel may be waived.

This Court has also "presumed that *statutory* provisions are subject to waiver by voluntary agreement of the parties," unless there is "some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201. As in the criminal cases involving constitutional rights, this Court has repeatedly applied the "knowing and voluntary" waiver standard to the relinquishment of statutory rights outside of the setting of criminal law. For example, it has held that waivers of Title VII rights must be both voluntary and knowing. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). See also *Town of Newton* v. *Rumery*, 480 U.S. 386, 397-98 (1987)

(applying "knowing and voluntary" standard to agreement to relinquish right to sue under 42 U.S.C. § 1983). More recently, in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998), this Court considered the standards governing the waiver or release of claims under the Age Discrimination and Employment Act, 29 U.S.C. § 621 *et seq.* The Court did not apply the general standards governing knowing and voluntary waivers, however, because it concluded that Congress, by passing the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), had set a higher threshold and precluded waiver of ADEA rights unless certain specific preconditions were met.[8]

To our knowledge, however, this Court has *not* previously had occasion to address the waiver or voluntariness issue in the specific context presented here: the relinquishment of a statutorily conferred right to an administrative hearing (or other administrative remedies). This situation differs from many of this Court's other cases involving waivers of statutory rights, because the purported waiver here was not accomplished by *an agreement of the parties* (unlike in *Alexander*, *Rumery*, and *Oubre*) but rather by the litigation conduct of one party. Unlike the criminal cases, moreover, a waiver in the setting presented by this case involves the claimant's assessment of the conduct of an administrative proceeding and administrative judge. Further review is warranted in this case, we submit, to permit this Court to clarify how the *Johnson* v. *Zerbst* waiver inquiry is to be conducted in this quite different setting. The answer to

---

[8] The Court's resolution of the issue in *Oubre* left in place a deep conflict in the circuits over whether the "knowing and voluntary" nature of a waiver made pursuant to an agreement between employer and employee should be judged (a) by a "totality of the circumstances" test that includes consideration of multiple factors relating to the conduct or characteristics of both employee and employer, or instead (b) under general principles of contract law. See Craig Senn, *Knowing And Voluntary Waivers Of Federal Employment Claims: Replacing The Totality Of The Circumstances Test With A "Waiver Certainty" Test*, 58 FLA. L. REV. 305, 307-08, 311-31 (2006) (surveying case law).

the questions presented is important and has ramifications not only for the many federal employees subject to the jurisdiction of the MSPB but also for others who, in a wide array of settings, take steps to give up important rights conferred by statute to an administrative hearing or to other administrative remedies.

As explained above (see pages 2, 14, *supra*), the MSPB has adopted the "knowing and voluntary" standard for waivers and has applied it, for example, in testing the validity of "an employee's waiver of his right to appeal a disciplinary action pursuant to 5 U.S.C. § 7701(a)." *McCall* v. *U.S. Postal Service*, 839 F.2d 664, 666-67 (1988) (discussing whether waiver pursuant to a "last chance" settlement agreement with the agency was made under "inherently coercive" circumstance or instead was "voluntary"). Yet as this case shows, the agency in practice applies a waiver standard that strongly *favors* the relinquishment of employee appeal rights under 5 U.S.C. § 7701(a) and it turns a blind eye toward considerations and evidence bearing directly on voluntariness.

The MSPB's approach thus conflicts with this Court's elucidation of the "voluntary and knowing" waiver standard in other settings. For example, this Court has made clear that waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). By the same token, courts "do not presume acquiescence in the loss of fundamental rights" (*Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937)), and indeed even in civil cases they "indulge every reasonable presumption *against* waiver." *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). In this case, by contrast, the MSPB *presumed* that petitioner's withdrawal of her appeal *was* knowing and voluntary, made no inquiry into the circumstances that suggested otherwise (including her request to discuss the matter with the AJ), and ignored petitioner's argument and evidence showing she

withdrew her appeal because of coercive circumstances. That is exactly the opposite of this Court's teachings in its waiver cases.

Further review would also permit this Court to clarify why a waiver cannot be voluntary and knowing when an individual believes that the alternative of proceeding with an administrative hearing will inflict serious reputational harm on her and require participation in proceedings before an agency that are a sham and lacking in basic due process protections. This Court's cases involving constitutional rights are closely analogous because of the unquestionable importance of the right to appeal through the MSPB, which is effectively the only post-deprivation due process right a terminated government employee will have. The exacting "knowing and voluntary" standard reflects a natural skepticism – equally appropriate in the setting of this case – that persons readily and willingly abandon important rights. Properly understood, the "knowing and voluntary" standard demands some *assurances*, not merely an assumption, that the abandonment of rights is truly voluntary.

For that reason, the MSPB was also wrong to uphold the Administrative Judge's dismissal order where the AJ did nothing to obtain such assurances under circumstances that suggested that assurances were needed. Although petitioner admittedly filed a motion requesting that her appeal be dismissed, her counsel also left a voicemail for the AJ stating that he "would like to speak with" the AJ and "discuss" the decision to withdraw the appeal with her and requested a return call (which the AJ did not do). C.A. JA 162. At a minimum, the AJ under these circumstances should have inquired into the grounds for petitioner's sudden and unusual withdrawal of her appeal on the eve of the hearing in order to ensure that Weliver's valuable appeal rights were being knowingly and voluntarily waived. Such inquiry was especially appropriate given the Administrative Judge's inexplicable failure to issue a trial subpoena as promised for a witness everyone (including the AJ) recognized was critical to the government's case, and given

the AJ's presumptive awareness at the time of her ruling that petitioner's counsel had attempted to reach her multiple times without success.

Finally, we note that if the Court grants review in this case, it can provide guidance by drawing on analogous authority as a basis for giving teeth to the requirement that administrative judges obtain adequate assurance that waivers of valuable rights are indeed knowing and voluntary. For example, under Rule 11(b)(2) of the Federal Rules of Criminal Procedure, which is entitled "Ensuring That a Plea Is Voluntary," district judges must "address the defendant personally in open court and determine that the plea is voluntary" before accepting any plea of guilty or nolo contendre. Such a modest prophylactic requirement makes eminent sense at least where, as here, a claimant makes a request to withdraw her administrative appeal on the eve of the hearing while at the same time indicating a desire to discuss the proposed withdrawal with the Administrative Judge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY EIGLES
Attorney At Law
10729 Evening Wind Court
Columbia, MD
(410) 730-1195

ALAN UNTEREINER*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

SEPTEMBER 2006

* *Counsel of Record*

APPENDICES

APPENDIX A

United States Court of Appeals
for the Federal Circuit

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

[Filed stamp:
APR 10 2006]

05-3275

FATIMA G. WELIVER,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

In CASE NO(S). PH0752040428-I-1

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

PER CURIAM (LINN, DYK, and PROST, Circuit Judges)

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATE APR 10 2006

/s/
Jan Horbaly, Clerk

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FATIMA G. WELIVER,
Appellant,

DOCKET NUMBER
PH-0752-04-0428-I-1

v.

SOCIAL SECURITY ADMINISTRATION,
Agency.

DATE: JUNE 1 2005

Henry Eigles, Esquire, Columbia, Maryland, for the appellant.

Rafael Melendez, Esquire, Philadelphia, Pennsylvania, and Taryn F. Jasner, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or

regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your rights to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro se Petitioners and Appellants," which is

contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD: /s/
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

FATIMA G. WELIVER,
Appellant,

DOCKET NUMBER
PH-0752-04-0428-I-1

v.

SOCIAL SECURITY ADMINISTRATION,
Agency.

DATE: September1, 2004

Henry Eigles, Esquire, Columbia, Maryland, for the appellant.

Rafael Melendez, Esquire, Philadelphia, Pennsylvania, for the agency.

Taryn F. Jasner, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Sandra J. Squire
Administrative Judge

INITIAL DECISION

Fatima G. Weliver (the appellant) filed an appeal on July 26, 2004, with the Merit Systems Protection Board's (Board) Northeastern Regional Office. The appellant appealed from the decision of the Social Security Administration to remove her from her position of Social Insurance Specialist (BLNGL) claims Representative, GS-0105-11/02, effective June 4, 2004. For the reasons below, the appeal is DISMISSED.

WITHDRAWAL

A prehearing conference was held with the parties in this matter on Friday, August 27, 2004. The prehearing conference was recorded and the tapes have been made a part of this record. After the prehearing conference on August 27, 2004, but before the scheduled hearing on September 1, 2004, I received telephone call from the appellant's representative which notified me that after consulting with the appellant, the appellant advised him that she desired to withdraw her [sic]. The tape of the message left by the representative has also been made a part of this record.

I subsequently received a Motion to Withdraw the appeal from the appellant's representative which indicated that the appellant desired to withdraw her appeal with prejudice. I find that the representative's motion constitutes an effective voluntary desire to withdraw the appeal. Therefore, the motion is GRANTED and the appeal is withdrawn. This matter is dismissed from further consideration. *See Jackson v. Department of the Air Force*, 45 M.S.P.R. 483, 484 (1990) (withdrawal of an appeal is an act of finality that removes it from the Board's jurisdiction).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/

Sandra J. Squire
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on October 6, 2004, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you

actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed [sic] with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to

provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX D

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

[Filed stamp:
JUNE 7 2006]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

Before Linn, Circuit Judge, Dyk, Circuit Judge, and Prost, Circuit Judge.

A petition for rehearing having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on June 14, 2006.

FOR THE COURT,

/s/

Jan Horbaly
Clerk

Dated: 06/07/2006

cc: Henry Eigles
Calvin Morrow

WELIVER V MSPB, 2005-3275
(MSPB - PH0752040428-I-1)